

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

To be argued by:
Joseph A. Pavone
Estimated Time: 15 Minutes

Docket No. 77-1244

In The
United States Court of Appeals
For the Second Circuit

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

— vs —

JOSEPH R. PUGIA, SR.,

Defendant-Appellant.

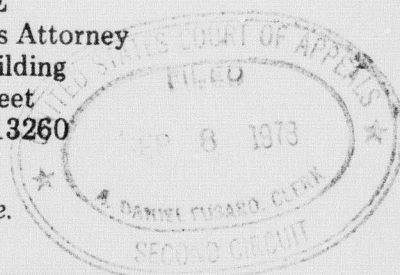
On Appeal From The United States District Court
For the Northern District of New York

BRIEF FOR APPELLEE,
United States of America

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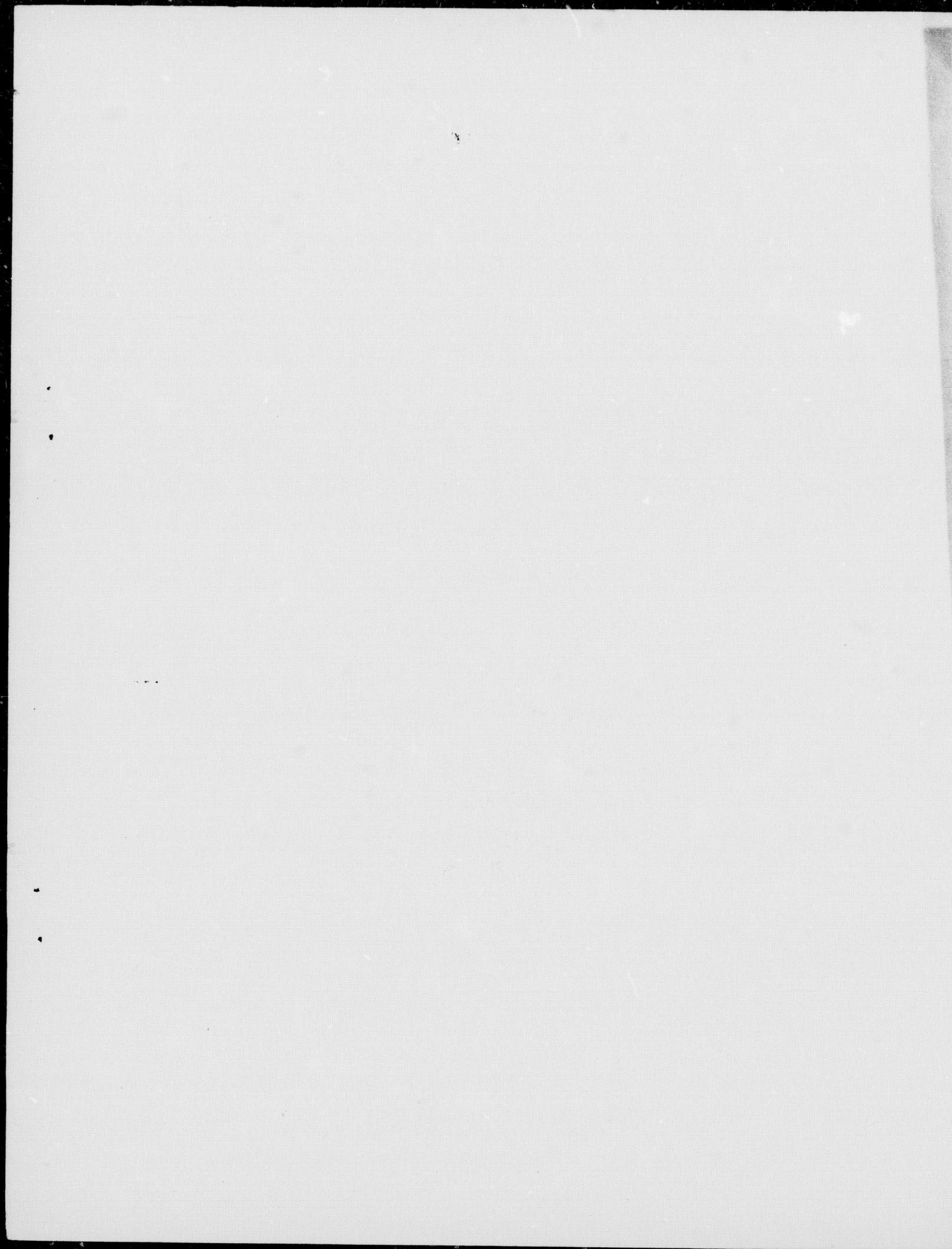


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In The
United States Court of Appeals
For the Second Circuit

Docket No. 77-1244

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

- VS -

JOSEPH R. PUGIA, SR.,
Defendant-Appellant.

BRIEF FOR APPELLEE,
United States of America

STATEMENT OF THE ISSUE

Whether there was sufficient evidence at trial to
establish a violation of Title 18, United States Code, Section
1014, beyond a reasonable doubt.

STATEMENT OF FACTS

The statement of facts included in the brief filed on behalf of the defendant is acceptable to the United States to the extent that it indicates the nature of the case, the course of the proceedings, the disposition of the case in the District Court and to the extent that it summarizes the testimony of most of the witnesses at trial with the exception of the following:

1. Contrary to defendant's assertion on page 15 of his brief that the Government witness David Frezza did not deny that he was aware that the information furnished by the defendant was incorrect, the witness Frezza did deny knowledge of the falsity of the information provided by the defendant on the financial statement.

Joseph Pugia testified in his own defense at trial that the whole idea for the false financial statement was David Frezza's (265-280)*. Pugia testified that Frezza called him up at home and told him to get down to the bank the next morning because "I am in a jam". (266) According to Pugia, Frezza told him to "Make me a financial statement" (268) and Frezza told Pugia what to put down (269). With respect

* References are to the trial transcript.

to the property at 318 William Street, the following colloquy took place between trial counsel and the defendant (275-276):

TRIAL COUNSEL

Q. And, well, let us look at the back of the document.

Did you complete the back part of the document, it says "Number 5, Mortgages owned?"

DEFENDANT

A. Yes.

Q. And did you do that by yourself or --

A. No. Dave and I did it at his desk. You see, his desk was on the left-hand side, right over by the window.

Q. And did you write in the figure -- did you write in "Marine Midland Bank?"

A. That is my writing.

Q. Okay.

A. Well, that "Marine Midland," you know --

Q. And "318 William Street," did you write that in?

A. Oh, boy -- yeah, I argued strong on that point, okay, because this 318 William Street has been a sore spot from Dave and I for quite a while.

Q. What do you mean?

A. Well, I rented from Mrs. Marcewicz -- I call her Bea.

Q. That is one of the witnesses?

A. Yes. And I rented from Bea for seven years, and I know her all my life, and David had been to my house and he knew it was only a duplex house and we rented the left side of it, and I didn't own that house and he knew I didn't own that house. He can't say I did not own that house, because he knew I didn't own that house.

Q. And you put it down, though?

A. Yes.

On rebuttal, the witness David Frezza succinctly denied he told Puglia to falsify the statement. (372)

Based upon the summarization of the testimony included in the brief filed by the defendant, the exception thereto noted above, the transcript of the trial itself, and the exhibits introduced at trial, the United States submits that the jury could have found and did find, the following facts:

In approximately June, 1974, Joseph R. Puglia, Sr., as president of a corporation entitled Mutual Auto Sales, Inc., approached the Mohawk Valley State Bank (which became, shortly thereafter, Bankers Trust Company of Central New York) in Utica, New York and sought to establish a line of credit on

behalf of the corporation. A line of credit was established and small loans were made to the corporation. (86- 91).

On July 17, 1974, Joseph Pugia gave the bank his personal guaranty of payment for the loans made to Mutual Auto Sales, Inc. (121-122)

Sometime prior to September 13, 1974, Pugia told the bank that he wanted to close out the corporation's credit with Marine Midland Bank and expand its account at Bankers Trust. (86-91). He was told that a personal financial statement would be required and on or about September 13, 1974, Joseph Pugia did submit the financial statement. (128-129) Subsequent to the submission of the financial statement, the Mutual Auto Sales loans were increased from \$20,000.00 to \$100,000.00. (G.X. 3a, 3b)

The financial statement consists of a two-page form which required Pugia to generally and collectively list his assets and liabilities in the beginning of the form with subsequent elaborations on supplemental schedules. (See G.X. 30 included in Appendix to Appellant's Brief) In the Assets column of the statement Pugia listed, among other things, "Real Estate"(Sch. No. 6) \$42,000.00. Pugia then itemized the real estate as two pieces of property valued at \$28,000.00 and \$14,000.00 respectively, which he mistakenly placed in

the Supplemental Schedule entitled "No. 5--Mortgages Owned". The latter parcel was identified as "318 William Street, Herkimer" and was followed with the notation "both homes can be sold for much more". (142-144)

As of the effective date of the financial statement, which was August 13, 1974, Joseph Puglia had no right, title, or interest in 318 William Street, Herkimer. (231-234)

ARGUMENT

THERE WAS SUFFICIENT EVIDENCE AT TRIAL
TO ESTABLISH A VIOLATION OF TITLE 18,
UNITED STATES CODE, SECTION 1014
BEYOND A REASONABLE DOUBT

Title 18, United States Code, Section 1014, provides in pertinent part as follows:

§ 1014. Loan and credit applications generally;
renewals and discounts; crop insurance.

Whoever knowingly makes any false statement or report, * * * for the purpose of influencing in any way the action of * * * any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than \$5,000 or imprisoned not more than two years, or both.

In order to establish an offense under this section, the following essential elements must be proved beyond a reasonable doubt:

1. That the defendant knowingly made a false statement to a bank;
2. That the bank had a federal nexus; *
3. That the false statement was made for the purpose of influencing the bank's action with respect to a loan or credit transaction. 18 U.S.C. § 1014; United States v. Carr, ___ F.2d ___, slip op. at 4391 (C.A. 2, Aug. 10, 1978); United States v. Cleary, 565 F.2d 43, 46 (C.A. 2, 1977); United States v. Sabatino, 485 F.2d 540, 544 (C.A. 2, 1973), cert. denied 415 U.S. 948 (1974); United States v. Niro, 338 F.2d 439, 440-441 (C.A. 2, 1964); United States v. Foster, 566 F.2d 1045, 1051-1052 (C.A. 6, 1977); United States v. Thurnhuber, 572 F.2d 1307, 1308-1309 (C.A. 9, 1977); United States v. Sheehy, 541 F.2d 123, 126-128 (C.A. 1, 1976); United States v. Braverman, 522 F.2d 218, 223-224 (C.A. 7, 1975), cert. denied 423 U.S. 485; United States v. Tokoph, 514 F.2d 597, 602-603 (C.A. 10, 1975); United States v. Simmons, 503 F.2d 831, 835 (C.A. 5, 1974); United States v. Goberman, 458 F.2d 226, 229 (C.A. 3, 1972).

"The essence of the crime is the making of false statements with intent to influence the bank, and whether or not the Bank was actually induced to rely upon them is irrelevant."
U.S. v. Cleary, *supra*, at 46.

* Proof of this element is not in issue.

When an attack is made on the sufficiency of the Government's proof, the evidence must be viewed in the light most favorable to the Government. Glasser v. United States, 315 U.S. 60, 80 (1948); United States v. Hockridge, 573 F.2d 752, (C.A. 2, 1978). The evidence in this case viewed in the light most favorable to the Government establishes the following facts:

In June of 1974, Joseph Pugia went to the bank to obtain loans for his corporation, Mutual Auto Sales, Inc. The bank established a small loan account for the corporation. Pugia, however, wanted to increase the corporation's borrowing power at Bankers Trust and he wanted to sever his business relations with another bank, Marine Midland. David Frezza, on behalf of the bank, told Pugia that the bank would require Pugia's personal guaranty on the corporate loans and Pugia's personal financial Statement. Pugia complied with the bank's request and on the financial statement Pugia falsely claimed to own property worth \$14,000.00 located at 318 William Street, Herkimer, New York. Pugia knew he didn't own 318 William Street because he used to live there and pay rent to the rightful owner, Beatrice Marciewz. Moreover, Pugia submitted the statement for the purpose of influencing the bank to continue and increase the line of credit to his corporation, because that's precisely what he asked the bank to do and that's precisely what the bank told him the statement was for. And of course, after the statement was submitted, he increased his borrowing on behalf of the corporation from \$20,000.00 to \$100,000.00.

In spite of evidence to establish these facts, which the defendant in his brief appears to concede exists, he claims it was insufficient to show (1) that he claimed the 318 William Street property as an asset; (2) that even if he did, it wasn't material; and (3) that there's no proof he intended to influence the action of the bank.

A review of the financial statement, together with the testimony of the witness David Frezza, leads any reasonable person to conclude that Joseph Pugia claimed the 318 William Street property as an asset. The first page of the statement contains a column for collectively listing all assets. In the space marked real estate the claim is \$42,000.00. In the space marked Mortgages Owned, the claim is "None". Concededly, Pugia mistakenly itemized his claimed \$42,000.00 worth of real estate in the wrong supplemental schedule putting them instead in Schedule 5, Mortgages Owned. However, as David Frezza testified, Pugia admitted he itemized these assets in the wrong place; moreover, he added the notation "both homes could be sold for much more" (142-144). If Pugia didn't intend to claim 318 William Street as an asset, the Government submits, then he wouldn't have claimed \$42,000.00 worth of real estate and he wouldn't have listed the property in any supplemental schedule anywhere on the financial statement.

Pugia, in his brief, makes much of his claim that the false statement in this case is not material. He refers to the misstated asset as "completely trivial". (Br. 25) The Government submits that claiming that a \$14,000.00 asset is a trivial matter borders on the frivolous. This Court has made it quite clear that the issue of materiality in a case like this is for the Court to determine. United States v. Cleary, supra, at 46. The gist of a Section 1014 offense is intent to influence the bank. Id. Materiality was never an issue before the District Court and indeed it never could be. "Assets and Liabilities" are the heart and soul of a financial statement and falsifying assets or liabilities on financial statements have consistently sustained convictions under 18 U.S.C. § 1014. United States v. Cleary, supra at 46; United States v. Goberman, supra at 229; United States v. Simmons, supra, at 835; United States v. Sheehy, supra at 127.

The defendant argues that the bank did not and could not rely on the financial statement in this case. Of course, reliance is not an element of the offense, United States v. Cleary, but the United States does not concede that the bank didn't rely on the statement. David Frezza testified that the bank required Pugia's personal financial statement (121), that the statement played a part in the bank's determination .

to continue to extend loans to Mutual Auto Sales, Inc., (148-149) and that the Mutual Auto Sales loans increased from \$20,000.00 to \$100,000.00 after the statement was submitted (116-117). The documentary evidence corroborates Frezza's testimony (G.X. 3a and 3b).

Finally, in his brief, defendant says there's no proof defendant made the false statement to influence the bank's action. There is, however, testimony that Puglia went to the bank for the express purpose of establishing and maintaining a line of credit for the Mutual Auto Sales Account. He was told he'd have to submit the statement and he did.

But if he didn't submit the statement to influence the bank, why did he submit it. Puglia's explanation is that he did it to get Frezza out of a "jam" and that he didn't need any more money from the bank. This was the essence of his case at trial and this is the essence of his appeal -- in effect, that the Grand Jury indicted the wrong man. The trial jury rejected this argument and for good cause. Observation of witness demeanor aside, Joseph Puglia's story belies credibility when considered against the facts and circumstances of the case. Puglia claims he didn't need any more money from the bank and that he filled out the false financial statement at David Frezza's insistence, in Frezza's

presence, and that they threw away "bad" statements until they came up with a "good" one. Puglia claims Frezza told him what to put down. If this were the case, why was the American Motors Corporation deposit put in the wrong place on the statement, and why was the 318 William Street property itemized in the wrong schedule if Frezza was sitting right there telling Puglia what to do. And, most importantly, if Puglia prepared and submitted the financial statement for the sole purpose of getting Frezza out of a jam, after the statement was submitted, why did he continue to borrow money on behalf of the corporation until the balance reached \$100,000.00.

In addition, the veracity of Puglia's direct testimony was severely impugned on cross-examination and rebuttal in several ways. For example, Puglia testified that it was Frezza's idea to falsely claim ownership of the 318 William Street property and the American Motors Corporation deposit and that he, Puglia, had never claimed he owned those assets before. (340-341) However, it was established that he did indeed claim ownership of these assets on other occasions. (387-391; 395-396) He also testified that he had a very good memory concerning the filling out of the financial statement (302, 310-311, 343-344); however, in a deposition he had given over 1 year prior to trial, he could hardly remember it. (345) Finally, his whole tenor on direct examination attempted to convey the impression that he hardly knew what a financial

statement was and that he was taken advantage of by Frezza. On cross-examination, however, he admitted that in his long experience in the car business, he was familiar with financial statements. (331-334)

In his brief, Pugia argues that this case is indistinguishable from United States v. Kramer, 500 F.2d 1185 (C.A. 10, 1974). The cases, however, are clearly distinguishable. In Kramer, the Court found that there was no evidence to establish that the defendant, who was charged with aiding and abetting, had ever in fact aided or abetted the maker in preparing the false statement; nor was there evidence that he knew the statement was false. Finally, there was no evidence to show that the financial statement was submitted to influence approval of a loan because another financial statement already existed, the defendant Kramer was the person to approve the loan, and the loan had already been made at the time of the statement. 500 F.2d at 1187-1188. In this case, however, there is proof that Pugia submitted the statement, there is proof he knew the statement contained false information, and there is proof he intended and did in fact, increase the loans to Mutual Auto Sales, Inc. Assuming arguendo defendant's suggestion of complicity on the part of Frezza in the circumstances surrounding the submission of the false statement in this case, it would not serve to immunize Pugia's criminal liability. United States v. Niro, supra, at 441. Pugia

was after the bank's money, not David Frezza's.

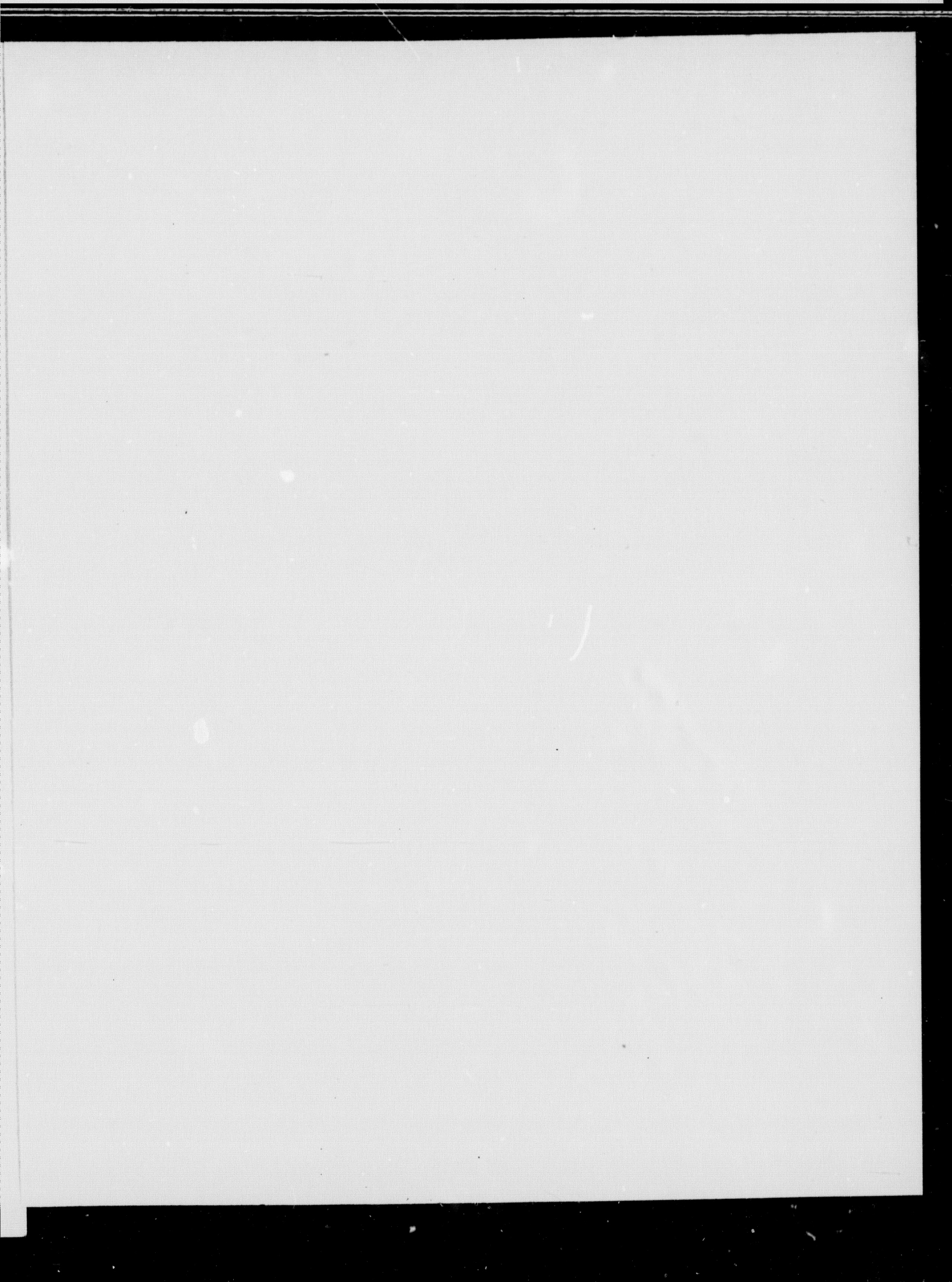
Joseph Puglia's dissatisfaction with the jury's failure to believe his story is what formed the basis for this appeal. The Government submits that this dissatisfaction is no basis for this Court to take action.

CONCLUSION

The Judgment of the District Court should be affirmed.

Respectfully submitted,
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Affidavit of Service

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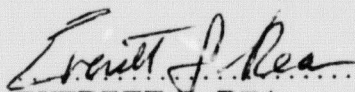
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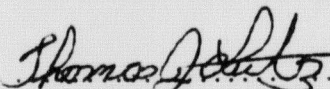
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cc: **Joseph A. Pavone, Esq.**
Assistant United States Attorney

